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IN THE

Supreme Court of the United States

OCTOBER TERM, 1980

No. A-6

RONALD M. STEVENS,

Petitioner,

vs.

STATE OF NEW JERSEY,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE APPELLATE DIVISION, SUPERIOR COURT OF NEW JERSEY

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Has petitioner been denied his rights to effective assistance of counsel and due process of law, where no state court in the criminal proceedings against petitioner fully and fairly considered a Fourth Amendment issue raised on his behalf, although the issue was raised pretrial at the earliest opportunity by a motion to suppress evidence, although the Supreme Court of the United States conclusively vindicated petitioner's position in *Delaware v. Prouse*, 440 U.S. 648 (1979), before petitioner appealed from the denial of his motion to suppress, and despite the obligation of the state courts to provide a "fair and full opportunity to litigate" Fourth Amendment claims as set forth in *Stone v. Powell*, 428 U.S. 465 (1976)?

2. Should *Delaware v. Prouse*, 440 U.S. 648 (1979), be applied retroactively to cases still on direct appeal at the date of its decision?

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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1980 No. A-6

RONALD M. STEVENS,

Petitioner,

vs.

STATE OF NEW JERSEY,

Respondent.

Petition for a Writ of Certiorari to the Appellate Division, Superior Court of New Jersey

Petitioner, Ronald M. Stevens, respectfully prays that a writ of *certiorari* issue to review the judgment of the Appellate Division, Superior Court of New Jersey entered in this proceeding on March 12, 1980.

OPINIONS BELOW

No opinion was rendered by the Law Division, Superior Court of New Jersey. The opinion of the Appellate Division, Superior Court of New Jersey is unpublished and reproduced herein at Appendix C. No opinion was rendered by the Supreme Court of New Jersey.

JURISDICTION

The judgment of the New Jersey Supreme Court denying petitioner's petition for certification was entered on May 28, 1980. This petition for *certiorari* was filed July 28, 1980, which is the next day following Sunday, July 27, 1980, the sixtieth day following entry of the judgment of the New Jersey Supreme Court. Jurisdiction is invoked under 28 U.S.C. §1257(3).

CONSTITUTIONAL PROVISIONS INVOLVED

The Fourth Amendment to the Constitution of the United States provides:

> The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

The Sixth Amendment to the Constitution of the United States provides, in relevant part:

> In all criminal prosecutions, the accused shall enjoy the right . . . to have the Assistance of Counsel for his defence.

The Fourteenth Amendment to the Constitution of the United States provides, in relevant part:

> Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

STATEMENT OF THE CASE

On December 21, 1977, petitioner Ronald Stevens was stopped by a New Jersey State patrolman while driving on the New Jersey Turnpike. In an affidavit submitted thereafter for a warrant to search the trunk of petitioner's vehicle, the trooper alleged that he stopped petitioner because his vehicle was weaving, and that he smelled marijuana when he stood outside petitioner's vehicle to ask him to produce his license and registration. Subsequently, following a search of the trunk of petitioner's vehicle which disclosed approximately 270 pounds of marijuana, petitioner was charged with possession of marijuana and possession of marijuana with intent to distribute. At a pre-trial suppression hearing held on November 3, 1978, petitioner denied that he had been weaving, and maintained that his vehicle had been stopped absent any probable cause. In a brief filed by petitioner in support of his motion to suppress, citing the then recent decision by the Delaware Supreme Court, *State v. Prouse*, 382 A.2d 1359 (1978), he claimed that absent reasonable suspicion for stopping the vehicle, the marijuana was re-

quired to be suppressed. At the suppression hearing,[1] counsel for petitioner argued that petitioner had been stopped on a "routine" and unconstitutional license and registration check. The trial court responded by indicating that such routine checks were constitutional. During the course of the suppression hearing, the trial court indicated that it thought petitioner was probably *not* weaving, but held that such a finding was irrelevant. Rejecting petitioner's claims, the trial court denied petitioner's motion to suppress. Pursuant to a plea agreement dismissing the count of simple possession, petitioner then pled guilty to the count of possession with intent to distribute. On February 16, 1979, he was sentenced to 364 days in Burlington County Jail and given a fine of five hundred dollars. See Appendix B.

Petitioner filed a notice of appeal with the Appellate Division of the New Jersey Superior Court on April 9, 1979. In the interim, on March 27, 1979, petitioner's position at the suppression hearing was vindicated by the United States Supreme Court, which held in *Delaware v. Prouse*, 440 U.S. 648, 59 L.Ed.2d 660, 99 S. Ct. 1391 (1979), that police may not stop an automobile for a license and registration check, except in those situations in which there is at least an articulable and reasonable suspicion that a motorist is unlicensed or the vehicle not registered, or that the vehicle or an occupant is otherwise subject to seizure for violation of law. Accordingly, petitioner argued before the Appellate Division, *inter alia*, that his vehicle was unlawfully stopped at random in violation of *Prouse*.

By an opinion filed March 12, 1980, the Appellate Division rejected petitioner's arguments and affirmed his

1. As set forth below, there was no trial. The suppression hearing court will be referred to herein as "the trial court."

conviction. See Appendix C. While noting that the trial court "express[ed] skepticism as to the weaving of defendant's vehicle," see appendix p. 8a, the court held that *Prouse* should not be given retroactive application. Without any further analysis and without citing any case law, the Appellate Division also rejected defendant's argument that, having raised the *Prouse* issue, he was entitled to the benefit of the favorable Fourth Amendment Law.

On April 7, 1980, petitioner petitioned for a writ of certification from the New Jersey Supreme Court. The question presented was as follows:

> Where defendant's vehicle was stopped by state police on the New Jersey Turnpike in the absence of any reasonable or articulable suspicion that defendant or his vehicle was subject to stop or seizure for violation of any law, where defendant challenged the legality of the stop at a subsequent suppression hearing on the ground that such a "random" stop violated his rights protected by the Fourth Amendment, and where, prior to oral argument in the Appellate Division the United States Supreme Court held in *Delaware v. Prouse* that such random stops are unlawful, was it error for the Appellate Division to hold that the fourth amendment, as argued by defendant in the trial court and as interpreted by *Prouse*, was unavailable to defendant in light of *Prouse*.

Petitioner's petition for certification by the New Jersey Supreme Court was denied without opinion on May 28, 1980. See Appendix A.

REASONS FOR GRANTING THE WRIT

Point I

The denial by the New Jersey courts of petitioner's right to present a valid constitutional issue in his defense raises significant issues in connection with the Sixth and Fourteenth Amendments and the administration of federal *habeas corpus* relief which should be resolved by this Court.

This case presents a fundamental issue relating to rights guaranteed by the Sixth and Fourteenth Amendments—namely, has petitioner been denied his rights to effective assistance of counsel and to due process of law where his counsel has properly raised and preserved a Fourth Amendment issue, but the state courts have refused to fully and fairly consider the claim despite the existence of favorable controlling precedent of this Court. Had the courts below given full and fair consideration to the defense raised, dismissal of the charges against petitioner would have been mandated. As developed in the following pages, the failure by the state courts to properly consider petitioner's claim directly contravenes long-standing precedent of this Court by which a criminal defendant's rights to effective assistance of counsel and due process of law have been established, and also violates the requirement that "an opportunity for full and fair litigation of a Fourth Amendment claim" be provided by the state courts. *See Stone v. Powell*, 428 U.S. 465, 49 L.Ed.2d 1067, 96 S. Ct. 3037, reh. den. 429 U.S. 874, 50 L.Ed.2d 158, 97 S. Ct. 197 (1976). Therefore, this case presents issues vitally affecting the administration of state criminal trials and their relationship to federal *habeas corpus* proceedings.

A. ***The failure of the New Jersey courts to consider petitioner's Fourth Amendment claim raises substantial Sixth Amendment and due process issues applicable to all criminal proceedings***

The law is settled that effective assistance of counsel is a right guaranteed by the Due Process Clause to defendants in the criminal courts of the states. *Faretta v. California*, 422 U.S. 806, 818, 45 L.Ed.2d 562, 572, 95 S. Ct. 2525 (1975); *Gideon v. Wainwright*, 372 U.S. 335, 9 L.Ed.2d 799, 83 S. Ct. 792 (1963). As stated in *Faretta*, "the amendment constitutionalizes the right in an adversary criminal trial to make a defense as we know it. See *California v. Green*, 399 U.S. 149, 176, 26 L.Ed.2d 489, 90 S. Ct. 1930 (Harlan J., concurring)." 422 U.S. at 818, 45 L.Ed.2d at 572. This Court has also recognized a criminal defendant's right to counsel on appeal from a conviction. *Douglas v. California*, 327 U.S. 353, 9 L.Ed.2d 811, 83 S. Ct. 814, *reh. den.* 373 U.S. 905, 10 L.Ed.2d 200, 83 S. Ct. 1288 (1963). Indeed, as early as 1932 this Court, in *Powell v. Alabama*, 287 U.S. 45, 77 L.Ed. 158, 53 S. Ct. 55 (1932), stated that the hearing to which criminal defendants are entitled as due process of law:

> has always included the right to the aid of counsel when desired and provided by that party asserting the right. The right to be heard would be, in many cases, of little avail if it did not comprehend the right to be heard by counsel. Even the intelligent and educated layman has small and sometimes no skill in the science of law. If charged with crime, he is incapable, generally, of determining for himself whether the indictment is good or bad. He is unfamiliar with the rules of evidence. Left without the aid of counsel

> he may be put on trial without a proper charge, and convicted upon incompetent evidence, or evidence irrelevant to the issue or otherwise inadmissible. He lacks both the skill and knowledge adequate to prepare his defense, even though he has a perfect one. He requires the guiding hand of counsel at every step in the proceedings against him. Without it, though he be not guilty, he faces the danger of conviction because he does not know how to establish his innocence. . . . If in any case, civil or criminal, a state or federal court were arbitrarily to refuse to hear a party by counsel, employed by and appearing for him, it reasonably may not be doubted that such a refusal would be a denial of hearing, and, therefore, of due process in the constitutional sense [287 U.S. at 68-69, 77 L.Ed. at 170].

As stated in *Powell*, a criminal defendant requires "the guiding hand of counsel" at every stage in the proceedings. Conversely, counsel is obligated to take all necessary action to protect the accused. Defense counsel

> should inform the accused of his rights forthwith and take all necessary action to vindicate such rights. He should consider all procedural steps which in good faith may be taken, including, for example . . . *moving to suppress illegally obtained evidence* . . . [American Bar Association Project on Standards for Criminal Justice, Standards Relating to the Defense Function §3.6(a) (1974) (emphasis supplied)].

Indeed, failure by trial counsel to properly raise Fourth Amendment issues has led to reversal of convictions on the ground that the defendant was denied effective assistance

of counsel. *See Government of the Canal Zone v. C.*, 497 F.2d 1253 (5th Cir. 1973) (failure by counsel to question legality of detention, search and arrest); *People v. Ibarra*, 60 Cal. 2d 460, 34 Cal. Rptr. 863, 386 P.2d 487 (Cal. Sup. Ct. 1963) (failure by counsel to object to introduction of heroin into evidence, allegedly obtained in violation of defendant's Fourth Amendment rights); *People v. Odon*, 71 Ill. App. 2d 480, 218 N.E.2d 116 (Ill. App. Ct. 1966) (failure by counsel to move to suppress exhibits, allegedly obtained in violation of defendant's Fourth Amendment rights).

In the instant case counsel was relying on settled law to conclude that probable cause or some reasonable suspicion was necessary to stop a moving vehicle. By 1968, this Court had held in *Terry v. Ohio*, 392 U.S. 1, 20 L.Ed.2d 899, 88 S. Ct. 1868 (1968), that the Fourth Amendment was applicable to searches and seizures short of formal arrest. Then, in 1973, in *Almeida-Sanchez v. United States*, 413 U.S. 266, 37 L.Ed.2d 596, 93 S. Ct. 2535 (1973), this Court held that in the absence of probable cause or consent, a warrantless search of an automobile violated the defendant's Fourth Amendment rights, where the stop and search were not incident to a border search or justified by the "automobile exception" established by *Carroll v. United States*, 267 U.S. 132, 69 L.Ed. 543, 45 S. Ct. 280 (1925). Even in the context of border searches, this Court held in *United States v. Brignoni-Ponce*, 422 U.S. 873, 45 L.Ed.2d 607, 95 S. Ct. 2574 (1975), that although the Fourth Amendment does not require probable cause to search a vehicle or arrest its occupants, police may stop vehicles only if they are aware of specific articulable facts, which, when taken with rational inferences therefrom, would indicate that the vehicle contains aliens who might be in the country illegally. Similarly, in *United States*

v. Ortiz, 422 U.S. 891, 45 L.Ed. 623, 95 S. Ct. 2585 (1975), this Court held that even at fixed checkpoints in a border area, probable cause is required to search vehicles suspected of harboring illegal aliens. In light of this line of cases, it can be no surprise that a number of courts had correctly perceived that police could not randomly stop moving vehicles absent reasonable suspicion or probable cause to do so. *See United States v. Montgomery*, 561 F.2d 875 (D.C. Cir. 1977); *United States v. Capps*, 503 F.2d 277 (6th Cir. 1974); *United States v. Nicholas*, 448 F.2d 622 (8th Cir. 1971); *State v. Ochoa*, 23 Ariz. App. 510, 534 P.2d 441 (1975), *rev'd* on other grounds 112 Ariz. 582, 544 P.2d 1097 (Sup. Ct. 1976); *State v. Prouse*, 382 A.2d 1359 (Del. Sup. Ct. 1978); *People v. Ingle*, 36 N.Y.2d 413, 330 N.E.2d 39 (Ct. App. 1975); *Commonwealth v. Swanger*, 453 Pa. 107, 307 A.2d 875 (Sup. Ct. 1973).

Indeed, by 1978 all three states bordering on New Jersey had adopted the *Prouse* rule. In New Jersey, on the other hand, the state courts paid no apparent heed to a process which must have been obvious. In a line of cases beginning with *State v. Kabayama*, 98 N.J. Super. 85, 236 A.2d 164 (App. Div. 1967), *aff'd per curiam* without opinion 52 N.J. 507, 246 A.2d 714 (Sup. Ct. 1968), the New Jersey courts upheld the right of police to make random motor vehicle stops. *See State v. Braxton*, 111 N.J. Super. 191, 268 A.2d 40 (App. Div. 1970), *rev'd* 57 N.J. 286, 271 A.2d 713 (Sup. Ct. 1970); *State v. Gray*, 59 N.J. 563, 285 A.2d 1 (Sup. Ct. 1971); *State v. Marchitto*, 132 N.J. Super. 511, 334 A.2d 354 (App. Div. 1975); *Blanchard v. Town of Kearney*, 145 N.J. Super. 246, 367 A.2d 464 (Law Div. 1976), *aff'd per curiam* without opinion 154 N.J. Super. 158, 379 A.2d 288 (App. Div. 1977). However, the New Jersey decisions, ignoring this Court's development of the law, cited only pre-*Almeida* New Jersey authority.

Thus, competent counsel must have realized by no later than the mid-1970's that in light of the decisions of this Court, New Jersey precedent could no longer be persuasive on the issue of random automobile stops. Furthermore, this Court had granted *certiorari* in *Prouse* on October 2, 1978, *see* 439 U.S. 816, 58 L.Ed.2d 107, 99 S. Ct. 76, a full month before petitioner's suppression hearing. In any event, there can be no dispute that by the time this case was argued before the Appellate Division, *Prouse* had conclusively determined that police require reasonable suspicion in order to stop a moving vehicle.

Despite the foregoing, no New Jersey court at any level ruled on the merits of the *Prouse* defense as raised by petitioner. He is in no better position than he would be in had he never claimed that the random stop violated his rights. His counsel's efforts to assert this valid defense and preserve the issue on appeal have been nullified by the state courts.[2]

During the past twenty years, this Court has forcefully struck down similar unfair procedures which hindered the effectiveness of the representation provided by counsel

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2. The argument presented under this heading is expressed in terms of right to counsel and to due process of law. That should not be read to imply, however, that petitioner's rights were violated *only because* he was represented by counsel. To the contrary, the refusal by the state courts to properly consider petitioner's Fourth Amendment *Prouse* claim would have denied petitioner due process, even had he been proceeding *pro se*. Due process requires that there be an opportunity to present every available defense, *American Surety Co. v. Baldwin*, 287 U.S. 156, 168, 77 L.Ed. 231, 239, 53 S. Ct. 98 (1932), and the right to be heard embodied in due process "must necessarily embody a right to file motions . . . essential to present claims and raise relevant issues." *Holt v. Virginia*, 381 U.S. 131, 136, 14 L.Ed.2d 290, 293, 85 S. Ct. 1375 (1965). In the instant case, petitioner has in effect never received the day in court to which he is entitled.

in criminal proceedings. These cases, discussed in the following pages, have not been specifically extended to the instant issue. Their import, however, leads to the certain conclusion that petitioner's rights were violated.

In *Ferguson v. Georgia*, 365 U.S. 570, 5 L.Ed.2d 783, 81 S. Ct. 756 (1961), the Court held constitutionally invalid a Georgia statute that prevented a defendant from testifying under oath, and permitted him only to make an unsworn statement to the court and jury. The Court held that the statute interfered with a defendant's due process rights by preventing him from being questioned by his attorney.

In *Brooks v. Tennessee*, 406 U.S. 605, 32 L.Ed.2d 358, 92 S. Ct. 918 (1972), the Court held that a Tennessee statute, which required that a criminal defendant desiring to testify do so before any other witness for the defense could testify, violated due process rights secured by virtue of the Fifth and Sixth Amendments to the federal Constitution. The Court stated:

> Whether the defendant is to testify is an important tactical decision as well as a matter of constitutional right. By requiring the accused and his lawyer to make that choice without an opportunity to evaluate the actual worth of their evidence, the statute restricts the defense—particularly counsel—in the planning of its case. Furthermore, the penalty for not testifying first is to keep the defendant off the stand entirely, even though as a matter of professional judgment his lawyer might want to call him later in the trial. The accused is thereby deprived of the "guiding hand of counsel" in the timing of this critical element of his defense [406 U.S. at 612-613, 32 L.Ed.2d at 364].

In *Herring v. New York*, 422 U.S. 853, 45 L.Ed.2d 593, 95 S. Ct. 2550 (1975), the Court held unconstitutional a New York statute which conferred upon a trial court in a non-jury criminal trial discretion as to whether parties should be permitted to deliver summations. The Court held that the statute, insofar as it conferred upon the trial judge the power to deny counsel any opportunity to make a closing summation, violated the Sixth Amendment's guarantee of effective assistance of counsel. In discussing the theory behind the Sixth Amendment, the Court noted as follows:

> The decisions of this Court have not given to these constitutional provisions a narrowly literalistic construction. More specifically, the right to the assistance of counsel has been understood to mean that there can be no restrictions upon the function of counsel in defending a criminal prosecution in accord with the traditions of the adversary fact-finding process that has been constitutionalized in the Sixth and Fourteenth Amendments [422 U.S. at 857, 45 L.Ed.2d at 598].

In *Geders v. United States*, 425 U.S. 80, 47 L.Ed.2d 592, 96 S. Ct. 1330 (1976), the Court overturned a conviction based on a trial in which the defendant had been prevented from consulting with his counsel during an overnight recess between defendant's direct and cross examination. Noting the potential conflict between the problem of improper coaching of the defendant and defendant's right to consult with his attorney during a recess in the trial, the Court held that the conflict must, under the Sixth Amendment, be resolved in favor of right to the assistance and guidance of counsel.

Limitations placed on the effectiveness of defense counsel by the trial court also led to reversal in *Holloway v. Arkansas,* 435 U.S. 475, 55 L.Ed.2d 426, 98 S. Ct. 1173 (1978), in which three co-defendants were represented by the same attorney at trial, despite counsel's repeated attempts to obtain an order for appointment of separate counsel. Because the defense counsel had been told information in confidence by each of the defendants, he was unable to effectively examine or cross-examine them during the trial. The Court noted:

> Joint representation of conflicting interests is suspect because of what it tends to prevent the attorney from doing. . . . The mere physical presence of an attorney does not fulfill the Sixth Amendment guarantee when the advocate's conflicting obligations have effectively sealed his lips on crucial matters [435 U.S. at 489-490, 55 L.Ed.2d at 438].

The reasoning set forth in this Court's decisions is clear—the "mere physical presence of an attorney," 435 U.S. at 490, 55 L.Ed.2d at 438, cannot satisfy Sixth Amendment requirements of effective assistance of counsel, under circumstances in which the attorney is prevented from presenting a defendant's case in a manner calculated to lead to fair proceedings. Certainly, basic to this right to effective assistance must be counsel's right (indeed, his duty) to raise all appropriate defenses. Instructions by a court to counsel, that counsel be barred from raising a valid Fourth Amendment argument, would certainly be a denial of a defendant's constitutional rights. Indeed, it would be unthinkable for a court to prevent a constitutional defense from being raised, unless the defendant had already waived

his opportunity to do so.[3] In the instant case, however, that is essentially what has happened—despite the fact that petitioner raised the *Prouse* issue from the very inception of these proceedings, despite the fact that petitioner called for application of *Prouse* on his appeal, and despite the fact that *Prouse* was decided *before* the Appellate Division heard petitioner's appeal, no New Jersey court has ever properly applied Fourth Amendment search and seizure law to petitioner.

It is possible that there were arguably valid State interests in some of the cases discussed above. In *Brooks v. Tennessee, supra,* for instance, it was possible to argue that the defendant should testify before any other defense witness so that the defendant could not shade his testimony to match that of the other witnesses. *See* 406 U.S. at 611, 32 L.Ed.2d at 363. In *Geders v. United States,* it was possible to argue that prohibiting consultation between counsel and the defendant was necessary to avoid fabricated testimony. These rationale were of course rejected by the Court. No such interest is even remotely suggested here, where petitioner was simply arbitrarily told that he could not have the benefits of a properly-raised constitutional issue. Thus far, in all its briefs filed in this matter, the State has presented no compelling need to overcome petitioner's denial of his Sixth Amendment and due process rights. Nor could it, for there is no basis for not applying to petitioner that law which is applied to others. Petitioner has not received the process which is due him.

This Court has stated that general rule that deprivation of assistance of counsel in violation of defendants' Sixth

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3. Even so, the burden would be on the State to prove that such a waiver was knowing, intelligent, and voluntary. *Johnson v. Zerbst,* 304 U.S. 485, 82 L.Ed. 1461, 58 S. Ct. 1019 (1938).

Amendment rights "can *never* be treated as harmless error." *Holloway v. Arkansas, supra,* 435 U.S. at 489, 55 L.Ed.2d at 437 (emphasis supplied). In keeping with this general rule, the Court made no inquiry as to prejudice suffered by the defendants in *Geders, Herring,* and *Holloway.* In light of the foregoing, and because of the importance of this case to the development of Sixth Amendment and due process rights, the Court should grant this petition.

B. ***The failure of the New Jersey courts to fully and fairly consider petitioner's Fourth Amendment claims is contrary to the policies established by this Court in*** **Stone v. Powell** ***and raises substantial questions in connection with the administration of federal*** **habeas corpus** ***relief***

In *Stone v. Powell, supra,* this Court held that where a state has provided an opportunity for full and fair litigation of a Fourth Amendment claim, a state prisoner may not be granted federal *habeas corpus* relief on the ground that evidence obtained in an unconstitutional search or seizure was introduced at his trial. Mr. Justice Powell, writing for a majority of this Court, noted the following serious intrusions on values important to our systems of government that can be caused by resort to *habeas corpus*:

> They include "(i) the most effective utilization of limited judicial resources, (ii) the necessity of finality in criminal trials, (iii) the minimization of friction between our federal and state systems of justice, and (iv) the maintenance of the constitutional balance upon which the doctrine of federalism is founded." *Schneckloth v. Bustamonte,* 412 U.S. at 259, 36 L.Ed.2d 854, 93 S. Ct. 2041 (*Powell,* J., concurring).

> [428 U.S. at 491 n.31, 49 L.Ed.2d at 1086 n.31 (other citations omitted).]

Central to the decision in *Stone* was an unwillingness on the part of this Court to assume that there exists a "general lack of appropriate sensitivity to constitutional rights in the trial and appellate courts of the several States." 428 U.S. at 493 n.35, 49 L.Ed.2d at 1087 n.35.

The holding in *Stone*, with its great significance for the administration of federal courts in connection with the *habeas* docket, requires that a state prisoner receive "an opportunity for full and fair litigation of a Fourth Amendment claim." If a prisoner has not received such a full and fair opportunity, then *Stone* does not preclude a subsequent federal *habeas* action. Thus, in order for *Stone* to have the salutary effect intended, it is crucial that the state courts assume their responsibility and provide real forums for consideration of Fourth Amendment claims.

In the instant case, petitioner raised the *Prouse* issue at his pretrial suppression hearing, the first opportunity at which he could do so. The trial judge rejected the argument, stating merely that he didn't think it was the law in New Jersey that routine license and registration checks were unconstitutional. After the denial of petitioner's motion to suppress and his subsequent guilty plea, petitioner in his appeal to the state appellate courts argued that his rights had been violated by the random automobile stop in violation of this Court's decision in *Delaware v. Prouse*, which had been announced following the suppression hearing but before petitioner's appeal was heard. Because *Prouse*, directly on point, had been decided, it was unnecessary for petitioner to set forth the development of

the law as discussed at pages 10-11 above. However, the Appellate Division rejected Petitioner's contention, relying only on stale New Jersey precedent (see Appendix C). The Supreme Court of New Jersey, which denied petitioner leave to appeal from the affirmance of his conviction by the Appellate Division, never considered petitioner's Fourth Amendment claims. It is apparent that petitioner was not accorded the benefit of decisions of this Court or of the developing law regarding random automobile stops. It is precisely for that reason that the Appellate Division was required to base its rejection of petitioner's Fourth Amendment claim on an irrelevant "retroactivity" analysis.

Had this Court not announced its decision in *Stone*, there could be no doubt that petitioner would have been able to present his *Prouse* claim to a federal district court in a *habeas* proceeding. A federal court would not have confined its analysis to antiquated New Jersey decisions, but would have taken into account the growth in the law since *Terry v. Ohio*. Thus, petitioner would almost certainly have been granted *habeas* relief by a federal district court. On the other hand, the New Jersey courts were unwilling to consider this development. This Court has never defined what must be included in a "fair and full opportunity to litigate" Fourth Amendment claims; however, where the law is not completely settled, a fair opportunity *must* include consideration by the state courts of all applicable precedent of this Court, for a state criminal defendant will not receive a second chance.[4] Unfortunately for petitioner, no state court ever considered the ap-

4. In New Jersey defendants are precluded from relitigating issues, even of constitutional dimensions, in state-court post-conviction relief proceedings if they have been raised on direct appeal. *State v. Trantino*, 60 N.J. 176, 180, 287 A.2d 177, 179 (Sup. Ct. 1972).

plicable precedent—not even the decisions of this Court predating the stop of petitioner's vehicle.

Petitioner has never received his full and fair opportunity to litigate his *Prouse* claim, because no New Jersey court has been willing to listen to his argument, despite its unquestioned correctness. Because of the failure by the New Jersey courts to consider petitioner's claim, petitioner will be forced to raise the *Prouse* issue in state and then federal *habeas* proceedings, thereby causing his unnecessary incarceration, a waste of judicial resources, and the other costs specified by Mr. Justice Powell. Nor is petitioner unique in not having had his constitutional arguments fully and fairly considered in the state courts. *See Mincey v. Arizona*, 437 U.S. 385, 404, 57 L.Ed.2d 290, 307, 98 S. Ct. 2408 (1978) (Marshall, J., concurring) (suggesting reconsideration of *Stone* because of state court divergence from federal rulings). *See also United States ex rel. Petillo v. New Jersey*, 562 F.2d 903, 906 (3d Cir. 1977) (providing examples). Indeed, in *Hines v. Auger*, 550 F.2d 1094, 1097 (8th Cir. 1977), the court stated that "[t]he emphasis of *Stone* is on the *opportunity* for full and fair litigation, not upon the fullness or fairness of the litigation." (emphasis in original). Nothing could be further from the philosophy behind *Stone v. Powell*. Therefore, this Court should reverse this matter and remand to the Appellate Division of the New Jersey Superior Court, in order that petitioner be provided with a full and fair opportunity for consideration of his *Prouse* claim, and in order that all state courts be admonished that they must properly fulfill their role in the protection of constitutional rights and values.

Point II

The retroactivity of *Prouse* raises substantial questions, which have not been addressed by this Court, concerning the development of *Stone v. Powell* and *United States v. Peltier*.

A. *Since state criminal defendants have been precluded by* Stone v. Powell *from raising Fourth Amendment claims in federal* habeas *relief proceedings, this Court should reconsider the retroactivity analysis developed in* United States v. Peltier

As developed in Point I above, this Court ruled in 1976 in *Stone v. Powell* that state criminal defendants may not litigate Fourth Amendment claims on federal *habeas* review, where they have had a full and fair opportunity to litigate those claims in the state court. Thus, unless a state court is required to give retroactive application to decisions of this Court to cases on direct appeal at the time of their rendering, state criminal defendants may never receive the protection of their constitutional rights to which they are entitled, even if these rights are unquestioned.

A year before *Stone* was decided, this Court decided *United States v. Peltier*, 422 U.S. 531, 45 L.Ed.2d 374, 95 S. Ct. 2213 (1975), which held that *Almeida-Sanchez* was not to be retroactively applied. *Peltier*, involving a federal prisoner, was announced before *Stone* had eliminated federal *habeas* review of state criminal Fourth Amendment claims. This Court has not considered a Fourth Amendment retroactivity case since *Stone*. Thus, this Court has not taken the opportunity to reconsider the

analysis used in *Peltier* in light of the further development in *Stone*, or to instruct the lower courts as to the proper interrelation of retroactivity and *habeas corpus* law.

In *Peltier*, this Court noted that in the context of the exclusionary rule, new constitutional principles have been accorded only prospective application. 422 U.S. at 535, 45 L.Ed.2d at 380. Now that state prisoners will be precluded from seeking to vindicate their rights in federal courts, however, it is especially important that this doctrine not be abused by describing each new decision of this Court as a "new constitutional principle." Otherwise, this Court will have encouraged police and other courts "to disregard the plain purport of our decisions and to adopt a let's-wait-until-it's-decided approach." *Desist v. United States*, 394 U.S. 244, 277, 22 L.Ed.2d 248, 272, 89 S. Ct. 1030 (1969) (Fortas, J., dissenting). Likewise, if there is no clear delineation of the meaning of "new constitutional principle" by this Court, state criminal suspects will be faced by the further problem that:

> If evidence is to be admitted in criminal trials in the absence of clear precedent declaring the search in question unconstitutional, the first duty of a court will be to deny the accused's motion to suppress if he cannot cite a case invalidating a search or seizure on identical facts. [*Peltier, supra*, 422 U.S. at 544, 45 L.Ed.2d at 391 (Brennan, J., dissenting).]

As discussed above at page 20, lower courts are struggling with what is meant by a "full and fair opportunity to litigate" Fourth Amendment issues. However, it is apparent that *Stone* substantially shifted the complex balance of factors, including the deterrent purpose

served by the exclusionary rule and the imperative of judicial integrity, *see Peltier,* 422 U.S. at 536, 45 L.Ed.2d at 380, to be taken into account in determining whether a Fourth Amendment decision should be accorded retroactive affect, now that lower federal courts no longer oversee the protection of Fourth Amendment rights. Therefore, this Court should grant petitioner's writ for *certiorari* in order to instruct the courts on the appropriate analysis of retroactivity problems in light of *Stone.*

B. *Despite the observation in* Peltier *that this Court has not accorded retroactive application to decisions involving the exclusionary rule, lower courts have continued after* Peltier *to give retroactive application to such decisions, including* Prouse, *which do not represent sharp breaks from past law*

In *United States v. Peltier, supra,* Mr. Justice Rehnquist noted for the Court that "in every case in which the Court has addressed the retroactivity problem in the context of the exclusionary rule, whereby concededly relevant evidence is excluded in order to enforce a constitutional guarantee that does not relate to the integrity of the fact-finding process, the Court has concluded that any such new constitutional principle would be accorded only prospective application." 422 U.S. at 535, 45 L.Ed.2d at 380 (footnote and citations omitted). Thus, although the retroactivity of a decision is not automatically determined by the particular provision of the Constitution on which the new decision is based, *Brown v. Louisiana,* 48 U.S. L.W. 4719, 4720 (1980) (Opinion of Brennan, J.); *Johnson v. New Jersey,* 384 U.S. 719, 728, 16 L.Ed.2d 882, 889, 86 S. Ct. 1772 (1966), *Peltier* has been read to create a pre-

sumption against retroactive application of this Court's Fourth Amendment decisions. *See, e.g., Peltier,* 422 U.S. at 550, 45 L.Ed.2d at 388-389 (Brennan, J., dissenting).

Because *Prouse* is merely an application of settled Fourth Amendment law, the question of retroactivity should not even arise. This Court has stated on numerous occasions that retroactivity is an issue only when a decision constitutes a "sharp break" with the line of earlier authority. *See, e.g., Chevron Oil Co. v. Huson,* 404 U.S. 97, 106, 30 L.Ed.2d 296, 306, 92 S. Ct. 349, 355 (1971); *Desist v. United States, supra.* This line of cases has continued its vitality since *Peltier,* which did not discuss the "sharp break" analysis, and federal courts have continued to apply variations of the sharp break analysis when retroactivity questions have arisen in Fourth Amendment cases. *See, e.g., United States v. Tucker,* 610 F.2d 1007, 1010-1013 (2d Cir. 1979) (applying *Dunaway v. New York,* 442 U.S. 200, 99 S. Ct. 2248, 60 L.Ed.2d 824 (1979), retroactively); *United States v. Dien,* 609 F.2d 1038, 1046 (2d Cir. 1979), adhered to 615 F.2d 10 (2d Cir. 1979) (applying *Arkansas v. Sanders,* 442 U.S. 753, 99 S. Ct. 2586, 61 L.Ed.2d 235 (1979), retroactively); *United States v. Schleis,* 582 F.2d 1166, 1174 (8th Cir. 1978) (*en banc*) (applying *United States v. Chadwick,* 433 U.S. 1, 53 L.Ed.2d 538, 97 S. Ct. 2476 (1977), retroactively); *United States v. Martinez,* 526 F.2d 954, 955-956 (5th Cir. 1976) (applying *United States v. Ortiz,* and *United States v. Brignoni-Ponce* retroactively). On the other hand, a number of courts have interpreted *Peltier* to preclude retroactive application of Fourth Amendment decisions. *See, e.g., United States v. Calandrella,* 605 F.2d 236 (6th Cir. 1979), *cert.* den. *sub nom Kaye v. United States,* — U.S. —, 62 L.Ed.2d 420, 100 S. Ct. 522 (1980) (*Chadwick*

not applied retroactively); *United States v. Jones*, 597 F.2d 485 (5th Cir. 1979), *cert.* den. – U.S. –, 62 L.Ed.2d 728, – S. Ct. – (1980), (*Michigan v. Tyler*, 436 U.S. 499, 56 L.Ed.2d 486, 98 S. Ct. 1942 (1978) and *Mincey v. Arizona*, 437 U.S. 385, 57 L.Ed.2d 290, 98 S. Ct. 2408 (1978) not applied retroactively).

Prouse itself has been denied retroactive application in New Jersey, *State v. Carpentieri*, 82 N.J. 546, 414 A.2d 966 (N.J. Sup. Ct. 1980) (4-3 decision), while in other states *Prouse* has received retroactive application; *see Casal v. State*, 375 So. 2d 1077 (Fla. Dist. Ct. App. 1979); *State v. Tucker*, 588 S.W.2d 296 (Tenn. Sup. Ct. 1979). Finally, in *Kretchmar v. Nebraska*, 440 U.S. 978, 60 L.Ed.2d 237, 99 S. Ct. 1783, on remand 203 Neb. 663, 280 N.W.2d 46 (Sup. Ct. 1979), this Court invited retroactive application of *Prouse* by vacating a judgment of conviction by the Supreme Court of Nebraska and remanding for further consideration in light of *Prouse*.

As discussed above, the Court in *Peltier* noted that this Court has never given retroactive application to a decision based on the Fourth Amendment exclusionary rule. Although that observation may be historically correct, it is not true of the lower courts and conflicts with the "sharp break" analysis, which is apparently still the law as developed by this Court. Therefore, this Court should grant petitioner's writ, so that the confusion in the lower courts generated by *Peltier* in connection with retroactivity of Fourth Amendment decisions can be eliminated.

CONCLUSION

For the reasons set forth in this petition, a writ of *certiorari* should issue to review the judgment of the Appellate Division, Superior Court of New Jersey.

Respectfully submitted,

/s/ Matthew P. Boylan
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Ronald M. Stevens

Dated: July 28, 1980

APPENDIX A

SUPREME COURT OF NEW JERSEY

SEPTEMBER TERM 1979

STATE OF NEW JERSEY,

Plaintiff-Respondent,

vs.

RONALD M. STEVENS,

Defendant-Petitioner.

ORDER

(Filed May 30, 1980)

To the Appellate Division, Superior Court:

A petition for certification of the judgment in A-2704-78 having been submitted to this Court, and the Court having considered the same;

It is ORDERED that the petition for certification is denied with costs.

WITNESS, the Honorable Robert N. Wilentz, Chief Justice, at Trenton, this 28th day of May, 1980.

A TRUE COPY,

/s/ Stephen W. Townsend
Clerk

APPENDIX B

THE STATE OF NEW JERSEY

vs.

RONALD M. STEVENS,

Defendant.

JUDGMENT OF CONVICTION AND ORDER FOR COMMITMENT

The defendant on June 15, 1978 having entered a plea of not guilty to Indictment No. I-531-77 for the crime(s) of Possession and Distribution of Controlled Dangerous Substance and the defendant having on November 3, 1978

RETRACTED PLEA OF NOT GUILTY AND ENTERED PLEA OF GUILTY TO: I-531-77 (First Count)

It is, therefore, on February 23, 1979, Ordered and Adjudged that the defendant be and is sentenced on the First Count of I-531-77 to the Burlington County Jail for 364 days. Credit given for three days. Defendant fined $500.00.

Dismiss: Second County of I-531-77. Sentence is stayed pending Appeal.

IT IS FURTHER ORDERED THAT THE SHERIFF DELIVER THE DEFENDANT TO THE AFORENAMED INSTITUTION TO SERVE HIS SENTENCE.

STATEMENT OF REASON REQUIRED BY *R.* 3:21-4(e) APPEARS ON THE REVERSE SIDE.

ATTORNEY FOR DEFENDANT
Upon entry of Guilty Plea or
Conviction

Roger Lowenstein, Esq.
At time of Sentencing

Roger Lowenstein, Esq.

E. M. Rupert, Court Clerk
Edward A. Kelly, Jr.,
County Clerk

DATED: May 21, 1979.

Admin. Office of the Courts

Defendant to receive *R.* 3:21-8
credit for time spent in custody
From to
Days credit 3.

/s/ Paul R. Kramer
Judge
PAUL R. KRAMER
J.S.C.

STATEMENT OF REASONS, *R.* 3:21-4(e)

1. Mule Case.

DATED: May 21, 1979.

/s/ Paul R. Kramer
PAUL R. KRAMER
J.S.C.

APPENDIX C

SUPERIOR COURT OF NEW JERSEY

APPELLATE DIVISION

A-2704-78

STATE OF NEW JERSEY,

Plaintiff-Respondent,

vs.

RONALD M. STEVENS,

Defendant-Appellant.

OPINION OF THE SUPERIOR COURT OF NEW JERSEY, APPELLATE DIVISION

(Filed March 12, 1980)

Argued: February 11, 1970—Decided: March 12, 1980

Before Judges Allcorn, Morgan and Francis.

On appeal from Superior Court, Law Division, Burlington County.

Roger A. Lowenstein argued the cause for appellant (Lowenstein, Sandler, Brochin, Kohl, Fisher & Boylan, attorneys; Philip Rosenbach, on the brief).

John J. Degnan, Attorney General, attorney for respondent (Bruce Myron Merrill, Deputy Attorney General, of counsel and on the brief).

The opinion of the court was delivered by
FRANCIS, J.A.D.

Defendant, Ronald Stevens, appeals from a conviction of possession of CDS (marijuana) with intent to distribute (*N.J.S.A.* 24:21-19(a)(1)) on his plea of guilty entered after denial of his motion to suppress as evidence, the marijuana found in the trunk of the car defendant was driving.

In the early evening of December 21, 1977 defendant was driving a rented car with Florida plates on the New Jersey Turnpike near Mount Laurel. He was on route from Florida to his home in Massachusetts. The car trunk contained approximately 269 pounds of marijuana.

Defendant Stevens testified that he was driving in a proper manner and within the speed limit when he was stopped by a state trooper. The trooper stated that he stopped the car after observing that it was weaving, and he wanted to check the condition of the driver as to fatigue or whether he was under the influence of alcohol or drugs. The trooper, after stopping the vehicle, asked Stevens for his driver's license and the vehicle registration, and after receiving these directed Stevens to exit his car.

When defendant opened his door to exit, the trooper stated that he immediately detected a marijuana odor. After placing Stevens in the patrol car the trooper proceeded to search defendant's vehicle for weapons since at that point the trooper had decided to have defendant follow him to the police barracks so that a search warrant could be obtained. Upon their arrival at the state police barracks in Moorestown, defendant was searched for the key to the car trunk. When the key was not found, defendant was told to empty his pockets and was handcuffed to a bench. Within the next two hours trooper Stolinski applied for and received a search warrant from a judge

in Burlington County. In his affidavit in support of his request for a search warrant, the trooper stated that he stopped defendant's car because it was weaving; that when he asked the defendant to exit the car the trooper detected a strong marijuana odor, and while the car was being inspected at the barracks another trooper also detected the odor. Armed with the search warrant, the automobile trunk was opened, the marijuana found, and the defendant arrested.

I

Defendant first complains that he was not weaving on the highway and that the judge who heard the suppression motion so found. He argues that such a finding relegates the act of the trooper stopping him to that of a "random traffic stop" of the type invalidated in *Delaware v. Prouse*, 440 U.S. 648, 99 S. Ct. 1391, 59 L.Ed.2d 660 (1979). In *Prouse*, which was decided subsequent to the stopping of the defendant's vehicle, the United States Supreme Court declared that:

> . . . except in those situations in which there is at least articulable and reasonable suspicion that a motorist is unlicensed or that an automobile is not registered, or that either the vehicle or an occupant is otherwise subject to seizure for violation of [the] law, [the] stopping [of] an automobile and detaining the driver in order to check his driver's license and the registration of the automobile are unreasonable under the Fourth Amendment. [400 U.S. at —, 99 S. Ct. at 1401, 59 L.Ed.2d at 673)

Defendant contends that *Prouse* should be retroactively applied to the stopping of his vehicle, and that any evidence flowing from the subsequent odor of the marijuana detected by the trooper and the resulting search should

be suppressed as being the fruit of an illegal stop. He also argues that even if *Prouse* is not applied retroactively as a general rule, he should still be able to receive the benefits of its holding because he challenged the constitutionality of random stops at the motion to suppress.

The transcript of the hearing on the motion to suppress shows that the judge did express skepticism as to the weaving of defendant's vehicle. However, he in effect considered the "weaving" question irrelevant, and upheld the stopping of the vehicle and the right of a police officer to stop a car for a license and registration check on the basis of the statutory authority of *N.J.S.A.* 39:3-29. Since we determine that *Prouse* shall only be applied prospectively, it is not necessary to consider the question of the weaving in relation to the legality of the vehicle stop.

Prior to *Prouse* the type of random vehicle stop complained of here was permitted in New Jersey. *State v. Gray*, 59 N.J. 563 (1971); *State v. Kabayama*, 98 N.J. Super. 85 (App. Div. 1967) aff'd. 52 N.J. 507 (1968); *State v. Marchitto*, 132 N.J. Super. 511 (App. Div. 1975), certif. den. 68 N.J. 163 (1975). Once having stopped the car, a police officer could request the driver to exit the vehicle. *State v. Boone*, 114 N.J. Super. 521, 524 (App. Div. 1971) certif. den., *sub nom State v. Terry*, 58 N.J. 59 (1971); *Pennsylvania v. Mimms*, 434 U.S. 106, 98 S. Ct. 330 (1977). *Prouse* unquestionably invalidated such stops, and in so doing grafted a new variant onto the exclusionary sanctions of the Fourth Amendment, thus implicating the question of retroactivity as to its application.

In *State v. Howery*, 80 N.J. 563 (1979) our Supreme Court considered the retroactivity of *Franks v. Delaware*, 438 U.S. 154, 98 S. Ct. 2674, 57 L.Ed.2d 667 (1978) which permitted a defendant to inquire into the veracity

of a search warrant affidavit, contrary to the prior practice prohibiting such a challenge. *State v. Petillo*, 61 N.J. 165 (1972), *cert. den.* 410 U.S. 945, 93 S. Ct. 139, 35 L.Ed.2d 611 (1973). In holding that *Franks* should be applied prospectively the court applied a three pronged test identified in *State v. Nash*, 64 N.J. 464, 469-470 (1974). That test considered: (1) the purpose of the rule, and whether it would be furthered by retroactive application; (2) the degree of reliance placed on the old rule by those who administer it; and (3) the effect of retroactive applications would have on the administration of justice.

Unlike *Nash*, where the Court held that a new rule which prohibits a defendant who appeals a municipal court conviction from receiving a greater sentence in the county court should have a limited retroactive effect permitting the new rule to govern the rights of the parties to the overruling case and the rights of parties who have not yet exhausted final direct appeal when the overruling case was decided, the court in *Howery* applied *Franks* prospectively. It determined that *Franks* (like *Prouse*) added a new variant to the judicially fashioned exclusionary remedy in Fourth Amendment cases; and it recognized that the primary purpose of the exclusionary rule was the deterrance of unlawful police conduct. The Court concluded that the deterred purpose of the *Franks* rule was not served by retroactive application. *State v. Howery*, 80 N.J. at 569 citing *U.S. v. Peltier*, 422 U.S. 531, 538-539, 95 S. Ct. 2313, 2317-2318, 45 L.Ed.2d 382 (1975).

If the deterrent purpose of the rule was not served by retroactive application in a case such as *Howery* which involved an alleged willful and knowing misstatement of facts in a search warrant affidavit, *a fortiori*, such a purpose would not be served when the conduct complained of as in the instant case was legally permissible at the time it

occurred, *i.e.* conduct engaged in "in good faith reliance on 'then-prevailing constitutional norms.' " *Id.* at 570; *U.S. v. Peltier*, 422 U.S. at 536, 95 S. Ct. at 2317.

Secondly, in *Howery* it was clear that the police officer in that case relied on the rule which preceded *Franks*. The same reliance, as indicated by the cases cited *supra*, was present here. Finally, the third factor in the *Howery* decision was the impact of retroactivity on the administration of justice. Unlike in *Howery* where it was found to be likely that many defendants would seek to challenge the veracity of affidavits supporting search warrants if any retroactive application of *Franks* were allowed it is not altogether apparent that as many defendants would seek to challenge the constitutionality of the stopping of their autos if limited retroactivity of *Prouse* to cases pending on direct appeal were allowed. Nevertheless, random automobile stops were apparently a common police activity prior to the *Prouse* decision. See *e.g.*, *State v. Marchitto*, 132 N.J. Super. 511 (App. Div. 1975), *certif. den.* 68 N.J. 163 (1975); *Blanchard v. Town of Kearny*, 145 N.J. Super. 246 (Law Div. 1976), *aff'd* 153 N.J. Super. 158 (App. Div. 1977). Challenges to the constitutionality of these stops would require inquiries into events in cases where the police may not have been careful to record the circumstances surrounding the stop because they acted under the belief that no justification for the stop was necessary. Moreover, even if this third consideration is not as compelling a rationale for declining to grant retroactivity as it was in *Howery*, when weighed against the two previous factors, a refusal to allow *Delaware v. Prouse*, *supra*, to be applied retroactively is indicated.

Howery was on direct appeal when *Franks* was decided. The Court in *Howery* was fully aware of the direct appeal status in that case and declined to afford relief. Indeed

the dissenting opinion in *Howery* argued that retroactivity should have been accorded and it begins with the observation by the dissenting Justice that the "defendant had not as yet exhausted all avenues of direct judicial review to which he was entitled by rule of court." *Howery* is therefore controlling. We cannot apply *Prouse* retroactively to this matter even though the case is still on direct appeal; nor is it significant that the defendant raised the constitutionality of the random vehicle stops below, thus purporting to preserve his position on appeal. We note that our determination that *Prouse* should not be applied retroactively is in accord with the recent decision of this court in *State v. Mann*, 171 N.J. Super. 178 (App. Div. 1979). *Contra State v. Carpentieri*, 168 N.J. Super. 589 (App. Div. 1979), *certif. granted* 81 N.J. 406 (1979).

II

Defendant next argues that the trooper's search of the interior of the vehicle at the scene was illegal, lacking probable cause. Having properly stopped the vehicle and having requested the defendant to exit, *Pennsylvania v. Mimms, supra*, the trooper testified that he then detected the odor of marijuana coming from the interior of the car. The judge assessed this testimony and found it to be credible and sufficient to establish probable cause. We agree. *State v. Johnson*, 42 N.J. 146 (1964).

III

The defendant also raises the constitutionality of the search of the car trunk asserting that there was no probable cause to search the trunk and that the warrant did not satisfy the particularity requirement of the State and Federal Constitution. He further complains that the destruction of the seized marijuana violated his right to due

process. He also complains that his conviction of "possession with intent to distribute" *N.J.S.A.* 24:21-19(a)(1) was improper. We have considered these contentions and find them to be without merit. *R.* 2:11-3(e)(2). Finally, the defendant asserts that the motion judge improperly limited his right of cross-examination of the arresting officer as to his observation that the automobile was "weaving." As discussed above in the first point raised by the defendant, the issue of "weaving" is relevant only if there had been a determination by this court that the proscription on random stops determined in *Prouse* should be given retroactive effect. Having declined so to do, the question of "weaving" is no longer relevant.

AFFIRMED.

A TRUE COPY.

/s/ Elizabeth McLaughlin,
Clerk